INDEX

Subject Index

	PAGE
Reply Brief of Petitioner	1
Introductory Statement	1
Argument	11
Point I—Compliance with Rules of Court	11
Point II—Damages in the Amount Awarded to Respondent by the State Court are not Supported by Substantial Evidence	15
Conclusion	20

TABLE OF AUTHORITIES

Cases

Guerin v. *Kirst*, 33 Cal. 2d 402, 202 P. 2d 10 ..... 11, 12, 14

STATUTES AND RULES

Fourteenth Amendment, Constitution of the United States 2

Rule 12, Rules of the Supreme Court of the United States 11

Section 3359, California Civil Code 12, 14

SUPREME COURT OF THE UNITED STATES

October Term, 1950

No. 75

EL RIO OILS (CANADA) LIMITED, A DELAWARE CORPORATION,

Petitioner, and Plaintiff, Cross-Defendant and Appellant Below,

against

PACIFIC COAST ASPHALT CO., INC., A CALIFORNIA CORPORATION

Respondent, and Defendant, Cross-Complainant, Appellant and Respondent Below,

against

RALPH EDGINGTON, DOING BUSINESS UNDER THE FICTITIOUS FIRM NAME AND STYLE OF "EDGINGTON OIL REFINERY,"

Intervenor and Respondent Below.

REPLY BRIEF OF PETITIONER

Introductory Statement

It is apparent from respondent's statement of the case and throughout its brief in opposition to the petition for writ of certiorari in this action that respondent has misconceived the basis upon which the petition is presented. There is no Federal statutory law involved in this case, but the right to present this petition arises from the refusal of the state courts in California to give to petitioner the

protection of the California law requiring that damages must in all cases be reasonable. The right to this protection is guaranteed to petitioner by the Fourteenth Amendment of the Constitution of the United States of America.

Respondent states on page 2 of its brief that the statement of facts presented by petitioner in its petition, brief and affidavits is inaccurate and misleading. This statement is not true. Petitioner endeavored to make all of its statements of fact completely accurate. It is significant that respondent contents itself with a general charge of inaccuracy and points to no specific instance of any statement that it alleges to be inaccurate or misleading. Although the statement of facts and references to the findings in this action by petitioner were necessarily brief, there is no instance known to petitioner where the brevity of the statements made by petitioner resulted in their being misleading. The complaint that the petitioner asserts and alleges matters wholly outside the record and concerning which there is no evidence is unjustified with one possible exception, viz., the statement that the principal *shareholders* of petitioner are Canadians. There is no doubt whatsoever but what the record shows the principal *officers* of petitioner are Canadians. There are numerous letters in the record as exhibits from Mr. Taylor, Secretary of the company, showing that his office is in Toronto. (See for example petitioner's exhibit No. 12). There are likewise numerous letters to and from Mr. Duncan McLaren, President of the company, showing that his office is in Toronto. (See for example petitioner's exhibit No. 44). There is no question but that the office of petitioner in Oxnard was merely its field office (see respondent's exhibit No. 33), and that the main office of petitioner was in Toronto. (See petitioner's exhibit No. 12). The statement made by respondent at page 6 that Mr. Doran resided in California is

false. Mr. Doran is a resident of Sudbury, Ontario (see respondent's exhibit No. 31), although he does frequently spend the winters in Southern California. Although it is true that the record does not specifically show who owns the shares of petitioner, the fact is that the principal shareholders are Canadians and this may fairly be presumed from the evidence that the President and the Secretary of the company reside in Canada and its principal office is in Toronto.

The statement of facts in the opinion of the California District Court of Appeal itself contains material inaccuracies. Such inaccuracies were, of course, not intentional but obviously arose because the statements in the opinion were based upon inaccurate statements in the brief of respondent filed in the California District Court of Appeal. The fact that the opinion of the California District Court of Appeal was written under a misapprehension as to material facts in the case was pointed out in a petition for re-hearing filed in said court on behalf of the petitioner herein (and also on behalf of the respondent herein, Pacific Coast Asphalt Co., Inc., with respect to the judgment against it in favor of Ralph Edgington). The precise argument made by petitioner on this point in its petition for rehearing addressed to the California District Court was as follows (pages 3-12):

> "In the instant case the judgment for $138,299.43 awarded PCAC against El Rio is predicted solely upon the existence of the alleged oral contract made in July, 1939, the term of which contract is supposed to run for the life of the El Rio wells, its lease or the Oxnard field. The sole evidence in support of this alleged contract is oral testimony given principally by Glywn S. Chase, whose testimony is in direct conflict in this respect with the letter Mr. Chase wrote Mr. McLaren on September 11, 1944 [El Rio Ex. No. 44]. In view of this fact, we believe the following quotation from the opinion of

the Supreme Court of this State in *Branson v. Caruthers* is here applicable.

> "The conflict between these two statements is apparent. Some misapprehension or misunderstanding must have occurred at the trial, and we do not think that evidence given under the circumstances can safely be relied upon as the basis of the judgment given below in favor of the plaintiff, or that the finding of the Court below is to be upheld here under the rule in respect to findings where there is a substantial conflict in the evidence."

See also the opinion of this Court in *O'Melia v. Adkins*, 73 Cal. App. 2d 143, at page 149, where it is said:

> "He cannot avoid the 'legal consequences' of his solemn writing by parol evidence contradictory thereof."

It is apparent from the statement of facts set forth in the majority opinion herein that said opinion was written under a misapprehension as to some material facts in this case. It is respectfully submitted that there is no evidence that plaintiff in 1939 was "on the verge of bankruptcy." It is true that plaintiff had not at that time successfully established a market for its oil, that it owed approximately $10,000.00, and that as of that time it did not have much cash. [Rep. Tr. pp. 948-950.] However, the fact that its well produced enough oil thereafter to bring to PCAC the sum of $409,530.29 [Clk. Tr. p. 113, lines 21-26] shows that its well alone was an asset worth considerably more than the $10,000.00 it owed.

We do not believe it is correct to say that El Rio sought "the assistance of the lessors." Certainly it did not ask any help from the Chase brothers with respect to its own financing, and the proposal made by Mr. Delaney that Chase brothers and El Rio "go into the refinery on a 50-50 basis" [Rep. Tr. p. 643, lines 11-17] cannot be properly constructed as "a request for assistance." It is likewise not true that El Rio and the Chases were to supply an equal part of the cash

capital. El Rio was turning over to the venture a previously constructed refinery [El Rio Ex. No. 3], and was supplying to that refinery its raw products, viz., the oil produced from the El Rio well ([Rep. Tr. p. 951, dines 10-12; El Rio Ex. No. 29]. At page 3 of the majority opinion it is also stated that plaintiff did not furnish its share of the financial assets necessary for the operation of the company. Even under the findings drawn by counsel for PCAC, the only financial obligation set forth with respect to El Rio in the oral agreement the parties are supposed to have made was an obligation to pay into PCAC the sum of $1,750.00 [Clk. Tr. p. 109, line 10, to p. 111, line 19]. Said sum of $1,750.00 was in fact paid in the Fall of 1939 [Rep. Tr. p. 660, lines 1-4]. There was a delay in making the payment, but it must not be forgotten that El Rio's head office is in Toronto, Canada, and that Canada became involved in World War II in 1939. At that time it was a difficult matter to get funds released from Canada for transmittal to the United States [PCAC Ex. No. 43].

At page 3 of the majority opinion it is stated:

> "plaintiff agreed to furnish for the life of the wells all oil produced on the leased premises to the extent that such oil could be used by defendant in the production and sale of asphalt and other products. It was agreed that plaintiff would not sell its oil to anyone but defendant but that defendant could sell any oil in excess of its own requirements which plaintiff produced."

The above statement contains part of the principal finding upon which damages of $138,299.43 are predicated: The only evidence that may be deemed to support the finding that El Rio orally contracted in July, 1939, to deliver its oil to the refinery on the leased premises for the life of its well, the lease, or the field is found in oral statements made at the time of the trial of this action. Such oral statements must be considered in the light of the rules set forth in *Mattingly v. Pennie,* 105 Cal. 514. As pointed out at pages 10-12

of El Rio's closing brief herein, it is respectfully submitted that such oral declarations should not be deemed *substantial* evidence in support of such finding in view of the following:

(1) The unexplained letter from Mr. Chase to Mr. McLaren, dated September 11, 1944 [El Rio Ex. 44], in which Mr. Chase refers to an inquiry by Edgington as to the proposed drilling of another well by El Rio and then stated, "All I could tell him was that if another well was drilled, the oil would probably go through the Refinery here as the El Rio owned a one-half interest." See, also, PCAC Exhibit 32.

(2) The application to the California Corporation Commissioner for a permit to issue the shares of PCAC [El Rio Ex. No. 3] drawn by the attorney who knew what the agrement was [Rep. Tr. p. 881, line 2, to p. 882, line 4], makes no mention of any agreement to deliver oil to PCAC for the life of the well. (See discussion and testimony regarding this at pages 20-23 of El Rio's closing brief.)

(3) In a letter dated October 6, 1939, written by Mr. Chase to Mr. McLaren [El Rio Ex. 37], Mr. Chase purports to inform Mr. McLaren of the agrement he and his brother entered into with Roy Roberts, yet at no place in said letter is any mention made of a contract on the part of El Rio forever to deliver its oil to PCAC.

(4) The proposed contract between El Rio and PCAC [El Rio Ex. 39] for the sale by El Rio and the purchase by PCAC of the El Rio production for the period of time that the proposed contract between PCAC and the Petrol Corporation was to remain in effect, would obviously have not been necessary had there already been a legally binding contract between El Rio and PCAC for the delivery of all of El Rio's oil to PCAC for the life of its well, lease, or the life of the field.

(5) There is no evidence Mr. Chase ever denied any of the statements made in El Rio Exhibits 17, 18, 19 and 35, and PCAC Exhibits 4 and 33, which establish that the persons involved did not consider that El Rio

was legally obligated to sell or deliver its oil only to PCAC.

(6) The fact that the refinery Mr. Chase and El Rio were going to operate by means of a new corporation, PCAC, had not been in the past successful would certainly mean that no intelligent business man would contract to sell all of the El Rio oil production to such new corporation for the life of the El Rio well or the lease or the field.

Additional reasons why such oral testimony by the Chase brothers cannot be considered *substantial* evidence in support of the alleged obligation to deliver all of the El Rio oil to the refinery for the life of the well, the lease, or the field, are as follows:

(1) As shown by the Supplement to the Reporter's Transcript at page 15, counsel for PCAC, as late as April 30, 1947, claimed that the alleged contract between El Rio and PCAC was one made in January of that year, and said counsel at that time made no claim whatsoever that PCAC had entered into the alleged contract in July, 1939, upon which recovery has herein been made.

(2) In the original cross complaint filed in this action on May 14, 1947, there is a significant absence of any allegations that El Rio contracted to deliver its oil to PCAC "for the life of" the well, the lease, or the field. It is also significant that in the second cause of action of said cross-complaint it was alleged that on or about January 15, 1947, El Rio and PCAC entered into an oral agreement for the sale of the oil produced by El Rio for the balance of the year 1947, and that on March 18, 1947, said parties again orally agreed upon the sale of the El Rio oil "for the balance of the year 1947" [Clk. Tr. p. 18, lines 13-24; p. 20, lines 17-26]. Since the obligation of El Rio to deliver its oil *for the balance of the year 1947 only* would be inconsistent with the alleged obligation to deliver its oil for the life of the well, the lease, or the field, the making of the alleged contract in 1947 should, in any event, relieve El Rio from the alleged contract to deliver oil for any period

beyond December 31, 1947. (See *Bangle v. Southwell*, 70 Cal. App. 561.) Note also, as pointed out on page 17 of our closing brief, that in the absence of an express provision as to the duration of the agreement for the operation of the refinery, the agreement would be binding upon each party only for a reasonable time. 4 Williston on Contracts, Revised Edition, Sec. 1027A, page 2852. As also pointed out at page 17 of said closing brief, in view of the dismal failure of PCAC in 1946 to provide a steady market for the El Rio oil, it cannot be said that El Rio acted unreasonably in seeking to terminate its relationship with Mr. Chase in early 1947.

The affidavit of Edward C. Maxwell, dated January 31, 1949, the attorney who knew what the agreement between the Chase brothers and El Rio was [Rep. Tr. p. 881, line 2, to p. 882, line 4], shows that at no time when the affiant was present did Warren Chase, Roy Roberts or Albert Weiss, or any or all of them, discuss or make any statement to the effect that all of the production of El Rio would or would not be sold to or otherwise delivered to either said Chase brothers or PCAC for the life of the well, the life of the lease, or the life of the field. Said affidavit is part of the record on appeal [ee Rule 5 of the Rules on Appeal and Clk. Tr. p. 174, lines 6-14].

4. El Rio Exhibit No. 30 is a contract dated July 13, 1939, between Roy Roberts and Glwyn S. Chase as first parties, and John A. Stone d.b.a. Pacific Coast Asphalt Sales Company as second party, in which the latter was given the exclusive right to market and sell all of the products produced from the PCAC refinery for a period of five years. This contract bears the same date as the articles of incorporation of PCAC [El Rio Ex. 1], which is the document, according to Mr. Chase's testimony, in which the "life of the" well, lease or field agreement is supposed to have been expressed [Rep. Tr. p. 880, line 21; p. 881, line 6].

The court in its majority opinion at page 7 states that it is conceded the Chase brothers gave testimony which would sustain the questioned finding. This statement is not correct. As pointed out at pages 26-29 of our opening brief and at pages 12-14 of our closing brief, if the entire testimony of the Chase brothers is taken as the gospel truth, there is still no evidence that El Rio contracted in 1939 to *sell* its oil to PCAC for the life of the wells, the lease, or the field. There is not a line of testimony given by Glwyn S. Chase or J. Warren Chase concerning the 1930 conversations in which any agreement to *sell* the El Rio oil is mentioned. Since the contract upon which recovery in the sum of $138,299.43 is allowed has been found to be an alleged agreement to *sell* oil to PCAC, the total absence of *any* evidence in support thereof should be sufficient cause to reverse the judgment against El Rio. Evidence should support the precise contract found, not some other and different agreement, before a judgment should be affirmed.

At page 3 of the majority opinion it is stated that in 1940 plaintiff and defendant "mutually agreed to modify their original contract as to the method of fixing the price of oil sold by plaintiff to defendant," and at page 4 it is stated that in 1943 "the provisions in the original contract were resumed, to wit, that defendant should pay plaintiff the current market price for the oil purchased." These statements cannot be correct because of the total absence of any evidence the alleged July, 1939, contract was for the *sale* of El Rio oil, and the complete absence in the testimony of the Chase brothers as to the 1939 conversations of any reference to the price to be paid for El Rio's oil or any method of fixing the price thereof. Note also that Mr. Chase directly testified that after PCAC was formed there were no further discussions about a contract between PCAC and El Rio until "the Petrol negotiations" [Rep. Tr. p. 883, line 22, to p. 885, line 3].

The Petrol negotiations were in the latter part of 1943 [Rep. Tr. p. 428, lines 3-18].

At page 4 of the majority opinion it is stated that in May, 1944, "plaintiff and defendant agreed to another modification of their original contract by providing that plaintiff should have the right to sell to anyone the oil produced by it over and beyond the requirements of defendant." This statement apparently refers to the letter of May 18, 1944, from Mr. von Bohm to Mr. Chase [PCAC Ex. 4]. This letter obviously does not refer to any alleged contract made in 1939, as Mr. von Bohm was not even present at the 1939 conversations relied upon as establishing the contract for alleged breach of which $138,299.43 damages were awarded (see pp. 37 and 39 of our opening brief).

The reasons we do not believe the evidence as to the alleged contract between PCAC and Mr. Edgington should be deemed substantial are set forth at pages 8-18 of our brief filed on behalf of PCAC. We respectfully request the Court again to examine the arguments set forth therein.

The record does not support the statement that plaintiff had notice of the alleged Edgington contract. The contract herein recovered upon by Edgington is one supposed to have been made in final form on or about February 17, 1947. The first time Mr. Chase talked to an El Rio representative after that date was on or about March 20, 1947, when he talked to Mr. von Bohm. His testimony *as to this conversation shows he did not tell Mr. von Bohm PCAC was under contract to Edgington;* instead, he merely stated, "Mr. Edgington has said that he would take all of our asphalt the rest of the year." [Rep. Tr. p. 809, lines 2-5]."

ARGUMENT

Point I

Compliance with Rules of Court

The jurisdictional statement required by Rule 12 of this Court is applicable only to cases on appeal. This is not such a case so respondent is in error in stating that petitioner did not comply with a necessary rule of the Court, namely, Rule 12. Petitioner has complied with all necessary rules of this Court, including each applicable provision of Rule 38.

A. Statement of the Grounds Upon Which It is Contended The Questions Involved Are Substantial

The constitutional question involved in this case is whether state courts are at liberty to refuse to apply in favor of a foreign corporation a statute of the state providing that "damages must, in all cases, be reasonable," where the highest court of that state has declared that "this command of the law is controlling in every instance". (*Guerin* v. *Kirst*, 33 Cal. 2d 402 (202 Pac. 2d 10).)

American social and political philosophy has been based upon general principles of equality since the beginning of this nation. The fundamental generalization as to the equality of all men is contained in the well known and historic phrases of the Declaration of Independence. Such philosophical theory is carried out in the specific guarantees of equality and in the protection from arbitrary, capricious and unjust disparity of treatment contained in the United States Constitution. Specific protection from unequal operation of the laws entitling a person to like privileges and burdens accorded to other persons in like circumstances is essentially and peculiarly an American con-

cept. These are times when it is important that the people of this nation maintain their belief in the American form of government. This belief can only be maintained so long as the people are confident that the judicial branch of that government will at all times fairly and impartially administer the laws and endeavor in all cases to achieve substantial justice.

This Honorable Court is the final authority on whether or not the lower courts in the federal judicial system or the state courts have denied to any person the equal protection of applicable laws. This Honorable Court obviously cannot undertake to review every decision of all of the subordinate federal courts and state courts in this country. This Honorable Court can and should, however, correct serious miscarriages of justice where they involve a clear violation of rights guaranteed by the United States Constitution and amendments thereof. It is respectfully submitted that in the present case the amount of damages awarded are in an amount at least ten times greater than the record would justify, and it is apparent from petitioner's Exhibit No. 51 that it cannot pay damages in the amount awarded here and that the bankruptcy of petitioner would be the inevitable consequence of the judgment here involved. If the California courts in this instance can award damages in an amount equal to at least ten times the amount of damages that could be justified by the facts in the record, there would seem to be no reason why they could not award damages in an amount one hundred times or one thousand times the amount that could be justified by the record. Such an award, however, can only be made by disregarding the California law that "damages must, in all cases, be reasonable", which law the California Supreme Court has said is controlling in every instance. (*Guerin* v. *Kirst*, 33 Cal. 2d 402, (202 Pac. 2d 10).) It is important to the con-

fidence of the American people in the judicial branch of their government that they know a denial of the protection of such general laws to a particular litigant is not without redress.

B. Raising of Federal Question in State Courts

On the first day of the trial of this case (April 13, 1948) petitioner introduced into evidence as its Exhibit No. 7, the report of the auditor for the receiver of respondent covering the operations of respondent from the time they began on July 15, 1939 to and including the time of the appointment of the receiver on April 15, 1947. (Reporter's Transcript, page 27, line 24 to page 29, line 7). This report showed: (1) that the operations over a period of more than seven years resulted in a net loss to respondent, after taxes; (2) that the greatest profit made by respondent in any of its fiscal years was $7,986.08 before taxes and $5,902.84 after taxes; (3) that the entire assets of respondent as of the date of said report had a book value of $37,924.68. (Petitioner's Exhibit No. 7, pages 10 and 11). Petitioner's counsel argued before the trial court and in written briefs submitted to the trial court, none of which appears in the record, that the amount of damages contended for by respondent was unreasonable and greatly excessive in amount. In the opening brief filed by petitioner in the District Court of Appeal (page 42) petitioner called attention to the fact that the damages recovered were grossly excessive and specifically called attention to the rule that "damages must, in all cases, be reasonable" as had then recently been affirmed by the California Supreme Court in *Guerin* v. *Kirst*, supra, The same rule and case were also cited by petitioner in its petition for a rehearing filed in the District Court of Appeal (page 16), and in the petition filed for a hearing in the California Supreme Court (page 45). In each of these instances the reasons why the damages awarded

in the judgment here involved were clearly and unmistakably unreasonable were set forth and were substantially the reasons given in the brief filed herein in support of the petition for writ of certiorari. As a matter of fact, the reasons set forth therein were taken practically verbatim from the petition for a hearing in the California Supreme Court.

Further, as shown by petitioner's Exhibit No. 45, on August 16, 1948, a few days after petitioner had been informed that the trial judge was going to award damages against petitioner, all oil produced by petitioner was offered to respondent and its receiver. This offer was made so as to permit respondent's refinery to begin operating at once in order that petitioner could prove the amount of damages claimed for loss of profits was utterly fantastic. See also petitioner's Exhibit No. 47, being a letter dated December 1, 1948, to Flywn S. Chase, president of respondent, from petitioner. The court found that the receiver of respondent, following the offer by petitioner to deliver oil to respondent, should have commenced operation of its refinery on September 5, 1948. Clerk's Transcript, page 126, lines 11-23.)

The awarding of damages against petitioner in the amount of $138,299.43 being clearly and unmistakably unreasonable from the facts in this case and this having been pointed out to the trial and appellate courts and the attention of the appellate courts having been called to the ruling by the California Supreme Court in *Guerin* v. *Kirst*, supra, the conclusion is inescapable that petitioner was denied the protection of the California law requiring that damages must be reasonable, viz., Section 3359 of the California Civil Code.

POINT II

Damages in the Amount Awarded to Respondent by the State Court are not Supported by Substantial Evidence.

In support of respondent's point IV respondent reprints a portion of the brief it filed in the California District Court of Appeals. Petitioner's answer to this particular argument was set forth at pages 27-32 of a reply brief filed in said Court as follows:

> **"Assuming PCAC Is Entitled to Damages for Breach by El Rio of a Contract for the Perpetual Sale (or Delivery) of Its Oil to PCAC, the Damages Recovered Are Grossly Excessive.**
>
> Counsel for PCAC states that the years 1947 and 1948 were "boom years" in the heavy oil and asphalt business. The question of whether or not there was a boom in the market for heavy oil is, of course, immaterial to the present problem. An increased price for the oil would benefit El Rio, the producer, but not PCAC, whose product was only asphalt. The only evidence that there was a boom in the market for asphalt during those years was Mr. Edginton's statement that he was in great need of asphalt at the time the complaint for dissolution was filed. Note that the record shows he bought no asphalt during the month of October, 1947. [Rep. Tr. p. 1196, line 26, to p. 1197, line 3.] Note also that as of the date of the reopening of the case for trial on November 23, 1948, there was a maritime strike then in existence which had continued from approximately the 1st of September. [Rep. Tr. p. 1334, lines 4-7]. It is interesting to note that the maritime strike in 1948 is supposed to have had no effect on the demand for asphalt, whereas the one in 1946 is relied on by PCAC to excuse its failure to provide a market for El Rio oil throughout all of the latter half of that year.
>
> The so-called 'prospectus" [PCAC Ex. 24] is immaterial on the question of fixing damages, in view of

the fact that that was an estimate somebody had dreamed up back in 1939 before the PCAC was even formed, and at the time of the trial there was an earnings record of that corporation extending over a period of more than seven years.

The statement that the record discloses El Rio made no effort at the trial to introduce any opposing testimony with reference to damages entirely overlooks the fact that El Rio Exhibit No. 7 sets forth the actual earnings history of PCAC during good years and bad. In said exhibit it appears that during PCAC's best year its total net profit, after taxes, was only $5,902.84.

The argument that the fact that the price of Oxnard crude went to $1.17½ per barrel in 1948 establishes that there was a boom market for asphalt during the entire period overlooks two impotant points:

(1) That under the evidence in this case, other producers in the Oxnard field, during all of the year 1947, were receiving only 51¢ per barrel for their oil; and

(2) That, as a matter of common knowledge, there are many products besides asphalt that are made from crude oil.

The argument at page 61 of the brief of PCAC that El Rio was required to sell its oil at the current market value and that during 1947 the current market price was 51¢ per barrel, and the statement at page 63 of said brief that after 1943 it was again agreed that the oil should be sold at the current market price thereof entirely overlooks Mr. Chase's testimony at page 751, line 13 through page 753, line 23 of the Reporter's Transcript. Note that there Mr. Chase testified that in June, 1945 he paid 58¢ a barrel for oil, whereas Vaca-Exeter was getting only 51¢. [Rep. Tr. p. 751, lines 22-24]. He further testified that at one time the differential in price was as much as 23¢ per barrel. [Rep. Tr. p. 752, lines 12-25.]

At page 62 counsel for PCAC has attempted to dispose, in a very summary manner, of our argument

that under the contract testified to by Mr. Chase the damages should in no event be greater than the profits PCAC would have made had it processed the El Rio oil for a refining charge. We believe that the argument at pages 44-45 of our opening brief has not been answered by counsel for PCAC. See also 25 Corpus Juris Secundum at page 562, where the following rule of law appears:

> "Where there is more than one method of estimating damages, that method which is most definite and certain should be adopted; and, if either of two measures will fully compensate the injured party for his loss, that measure which is less expensive to the wrongdoer must be adopted."

At page 62 counsel contends that the fact that there is no evidence whatsoever in the records concerning the profits the receiver would have made is immaterial. The error in this argument is apparent when it is noted that the receiver was appointed before the cross-complaint was filed. [Clk. Tr. pp. 142-145 and p. 25.] It is apparent from the order appointing the receiver that only the receiver had the power to operate the company during the pendency of the receivership, and that the receiver was, therefore, the only person who could have made any profits through operation of the refinery. See in this connection El Rio Exhibit 46, being a letter dated August 19, 1948, from Mr. Chase to El Rio, where the following paragraph appears:

> "You are advised that at the present time the order appointing Mr. Hal V. Hammons, Jr., as Receiver of the Pacific Coast Asphalt Company is still in full force and effect and under the terms of that order the Pacific Asphalt Company, as such, is restrained, as are its Officers, from engaging in business, that function having temporarily been placed in the hands of the Receiver. It follows, therefore, that the Pacific Coast Asphalt Company, as an entity separate and apart from the Receiver, is not yet in a position to operate the business of the Company

and, therefore, not in a position, separate and apart from the Receiver, to accept delivery of the oil."

The record discloses that no damages were asked for or awarded on account of the appointment of the receiver in the action for dissolution, the damages awarded against El Rio being solely the alleged loss of profits in the sum of $90,118.29, plus the sum of $48,181.14 awarded Mr. Edgington against PCAC for his alleged loss of profits and passed on to El Rio as additional damages.

PCAC argues at page 63 that El Rio should not complain because in computing the loss of profits there was included a charge of 30¢ per barrel for refining the injected distillate returned to El Rio. This argument entirely overlooks the fact that El Rio in fact sold its oil to Douglas Oil Co. of California under an agreement by which said buyer was required to return the injected distillate without charge, and also pay 2¢ per barrel more than any other producers in the field were receiving. Assuming that El Rio was in fact required to sell its oil to PCAC, there is no logic in the contention that it would have to sell its oil to PCAC at a price fixed unilaterally by Mr. Chase.

At page 64 PCAC argues that the fact that the El Rio oil was in fact acquired by the receiver of PCAC, for some months in 1947 should not affect its right to receive damages for loss of profits during those very same months. PCAC further argues that the agreement with Mr. Edgington would have required that the asphalt be sold to him at $5.50 per ton. But Mr. Edgington did pay $6.50 per ton and his testimony as to his understanding of the escalator clause was that if PCAC actually paid a higher price for its crude, then the price of the asphalt would be increased. [Rep. Tr. p. 1212, lines 5-8.]

It is stated at page 65 of PCAC's brief that it would have been impracticable and uneconomical to transport oil from Santa Maria to PCAC and then refine and transport it to a purchaser. No explanation is made as to why the mere unloading of the oil for the pro-

cessing at the PCAC plant and then the reloading for transportation down to Mr. Edgington's refinery would constitute any great item of cost. The question is not whether it would be more profitable to get oil in Oxnard field than from Santa Maria, but whether the getting of oil from Santa Maria would tend to minimize the alleged loss of profits. Mr. Chase's conclusion that it would be uneconomical to secure oil from Santa Maria is refuted by the testimony that Mr. Chase's customer was willing to go all the way to Santa Maria to get asphalt. [Rep. Tr. p. 1093, lines 5-9.]

PCAC states at page 66 of its brief that El Rio was fully informed of the alleged contract between PCAC and Mr. Edgington covering the balance of the year 1947, and refers to pages 802 and 810 of the Reporter's Transcript in support of its statement. At page 802 there merely appears a statement by Mr. Chase that he told Mr. von Bohm that Mr. Edgington had some good contracts on asphalt, and that Mr. Edgington "had said that he would take all of our asphalt up to all of their production of asphalt for the coming year up to his requirements." That is certainly not a statement that PCAC was legally bound to deliver asphalt to Mr. Edgington. At page 810 Mr. Chase testified:

> "I said 'Mr. Edgington has said that he would take all of our asphalt the rest of the year' and I said 'Vic, you know that asphalt market is improving and I think the price will go up' and I said 'If we can keep that well in high gear the way we did for a short period back in the first part of '45 and a few months in '46 we may be able to pay the fifty-eight cents again that we did during that period. He said 'That is fine; that is fine, just what we want.' He said 'I am in a big hurry' and he got in *my* car and went to town and I didn't see him until that afternoon."

Again, this is certainly not a statement that PCAC was legally bound to deliver asphalt to Mr. Edgington. Note, also, that this latter conversation was about March 20th [Rep. Tr. p. 809, lines 8-10], or two days